IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/10/2002

CORAM

THE HON'BLE MR. JUSTICE K. SAMPATH

S.A.No.968 of 1990

1. T.N. Krishna Pillai
S/o Nallaperumal,
88-B, Vinaitheertha Vinayagar
Koil Street,
Tirunelveli.

2. K. Shanmugathammal
S/o Ganapathi Pillai,
88, Vinaitheertha Vinayagar
Koil Street,
Tirunelveli.

3. Peramu Ammal (Died)
W/o Annamalai Pillai,
90, Vinaitheertha Vinayagar
Koil Street,
Tirunelveli.

4. A. Ramalakshmi Ammal
S/o Arunachalam Pillai,
Narasinganallur,
Tirunelveli Taluk & District.

5. Annamalai Pillai
6. Thamburatti
7. Shanmughasundari

Appellants 5 to 7 have been
brought on record as the
legal representatives of the
deceased 3rd appellant – Vide
order dated 14-6-1997 in
C.M.P.Nos.7235 to 7237/96. ... Appellants

-Vs-

1. K. Nallaperumal
S/o T.N. Krishnapillai
172, Vinaitheertha Vinayagar
Koil Street,

Tirunelveli.

2. K. Balasubramanian
S/o T.N. Krishnapillai,
98, Vinaitheertha Vinayagar
Koil Street,
Tirunelveli.

3. Parvathi Ammal W/o K. Ponniah,
60, Sivan Koil Street,
Valliyoor, Tirunelveli District.

4. P. Natarajan S/o P. Pattan,
Narasinganallur,
Tirunelveli Taluk & District. ... Respondents

For Appellants: ... Mr.T.M. Hariharan

For Respondents: ... Mr.S. Sampathkumar
for Mr.P. Peppin Fernando.

This second file is filed against the judgment and decree
dated 19-4-1989 made in A.S.No.49/87 on the file of the Subordinate Judge,
Tirunelveli.

:JUDGMENT
The substantial question of law raised in the second appeal is
" whether the appellate Court is correct in its construction of Ex.A-1 Will?"

2. We will straight away look into the document and try to
interpret it in the light of the established principles relating to documents
interpretation and see which of the Courts below has understood the document
correctly.

Ex.A-1 is the document; it is a Will dated 18.4.1943 executed
by one Nallaperumal Pillai; under the said Will, the testator gives all the
properties in the Schedule to the Will to his wife Adhilakshmi Ammal subject
to certain conditions; she is not to alienate Schedules 1 and 2 properties;
she is to take the Schedule 3 properties after the testator's lifetime
absolutely with full powers of alienation; after her lifetime, their foster
son Krishnan is to take the properties and enjoy them; neither Krishnan nor
his heirs can alienate the property at any time; the said Krishnan is to
perform the obsequies of both the testator and his wife Adhilakshmi Ammal.

3. From the Will it is seen that the said Krishnan was only a
minor aged 16 years at that time. The testator died in 1945 or 1946. From a
reading of the document it is seen that Schedules 1 and 2 are to be kept
intact by Adhilakshmi Ammal and taken by Krishnan after her lifetime and
neither Krishnan nor his heirs would have right to alienate. That is to say,

the properties are to be in the family in perpetuity.

4. Let us now have a look at the facts of the case. The plaintiffs are the sons and daughter of the first defendant Krishna Pillai, one of the legatees under the Will Ex.A-1 executed by Nallaperumal Pillai. Defendants 2 to 5 are alienees of Schedules 1 and 2 by way of sale or mortgage. The suit is for declaration that the sale of Schedules 1 and 2 items in favour of defendants 2 and 3 and the othi created in respect of Schedules 3 and 4 items in favour of defendants 4 and 5 are invalid and that the properties belonged to the plaintiffs' after the lifetime of the first defendant, their father.

5. The case as set out in the plaint is as follows:

The first defendant was taken as a foster son by Nallaperumal Pillai when he was 14 years old. On 18-4-1943 Nallaperumal Pillai executed Ex.A-1 Will in respect of Schedules 1 and 2 items in the Will. The testator's wife Adhilakshmi Ammal is to take them without powers of alienation and to be taken by the first defendant for being enjoyed after her lifetime. Adhilakshmi Ammal is to take Schedule 3 property absolutely. Nallaperumal Pillai died in 1945 or 1946. Adhilakshmi Ammal died in 1966. the first defendant on 25-5-1968 sold the suit Schedule 1 property to the second defendant under a registered sale deed for Rs.800/-. The sale is not binding on the plaintiffs. The plaintiffs did not derive any benefit under the sale. The second defendant is not a bona fide purchaser for value. The first defendant, the second defendant and her husband had been living in Door No.90 from 1 967 till 1977 and thereafter, in Door No.88. The roof of suit item 1 was put up by the first defendant. Neither the second defendant nor her husband was moneyed. On 22-7-1977 the second Schedule property was sold by the first defendant to the third defendant. This sale was also not binding on the plaintiffs. On 10-11-1974 the plaintiffs othied the third Schedule property to the fourth defendant. The othi was not binding on the plaintiffs. It was without consideration. On 11-5-1969 the first defendant created an othi in respect of the fourth Schedule property in favour of the fifth defendant. On 10-5-1975 he created a mel-othi in favour of the fifth defendant. The othies were not valid and binding on the plaintiffs. In these circumstances, the suit had been filed.

6. The first defendant and the other defendants resisted the suit contending inter alia as follows:

The will was executed by Nallaperumal Pillai when the first defendant was just 16 years old and was unmarried. As per the terms of the Will, the first defendant was to take the suit properties covered in the Will absolutely. On the death of Adhilakshmi Ammal, the first defendant became entitled to all the properties. It is not correct to say that he had no right to create encumbrance or to deal with the properties. Whatever the first defendant did was only for the benefit of all the plaintiffs for their education and maintenance. The plaintiffs had fully benefited from the transactions. The sales and mortgages in favour of all the other defendants had been created for valid purposes and they were all binding.

7. On the above pleadings, the trial Court framed the necessary issues and on the oral and the documentary evidence, held that Ex.A-1 created absolute rights in favour of the first defendant and that the plaintiffs could not question the encumbrances created by the first defendant. By judgment and decree dated 13-11-1986 the trial Court dismissed the suit. However, on appeal by the plaintiffs in A.S.No.49/87 the learned first Additional District Judge, Tirunelveli, by judgment and decree dated 19-4-1989 reversed the decision of the trial Court, allowed the appeal and decreed the suit.

8. It is as against that, the present second appeal has been filed. Defendants 1 to 4 filed the appeal. Pending appeal the third defendant/third appellant died and her legal representatives have been brought on record as appellants 5 to 7.

9. Mr.T.M. Hariharan, learned Counsel for the first appellant/ first defendant, made the following submissions:

The lower Appellate Court had wrongly assumed that the chief aim of Ex.A-1 Will was to prevent the properties bequeathed thereunder from being dealt with freely. This assumption was contrary to the tenor of the document and the provisions of the statute. The Appellate Court failed to see that life interest alone was given to the wife of the testator in Schedules 1 and 2 of Ex.A-1 Will with a view to protect those items and preserve them for the benefit of the first defendant, who was then a minor. The same terms used for bequest of Schedule 3 had not been used for the bequest of the first defendant in respect of the properties in Schedules 1 and 2 of Ex.A-1 Will. The lower Appellate Court ought to have held that the first defendant was the ultimate beneficiary. The later part of Ex.A-1 restricting absolute disposition regarding Schedules 1 and 2 was repugnant, void and inoperative. There was also no provision in the Will reserving the properties to the heirs of the first defendant and in the absence of such a clause, the assumption of the lower Appellate Court that only a life interest was created for the benefit of the first defendant was illegal and improper.

10. Mr.S. Sampathkumar, earned Counsel for the contesting respondents/plaintiffs, submitted that the interpretation given by the lower Appellate Court was perfectly correct and no exception could be taken to the same. The learned Counsel also relied on the decision in LAKSHMI AMMAL AND ANOTHER VS. ALLAUDDIN SAHIB (AIR 1962 Madras 247).

11. Section 84 of the Indian Succession Act provides that,

"where a clause is susceptible of two meanings according to one of which it

has some effect, and according to the other of which it can have none, the former shall be preferred."

Section 87 provides that,

"the testator's intention shallnot be set aside because it cannot take effect

to the full extent, but effect is to be given to it as far as possible."

Section 88 states that,

"where two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail."

Section 97 runs as follows:

"Where property is bequeathed to a person, and words are added which describe a class of person but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein,unless the contrary intention appears by the will."

Under Section 113:

"where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of testator in the thing bequeathed."

Under Section 114:

"No bequest is valid where by the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

Under Section 138:

"Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the Will had contained no such direction."

12. In BHAIDAS SHIVDAS VS. BAI GHULAB AND ANOTHER (AIR 1922 Privy Council 193) it has been held as follows:

"If words are used conferring absolute ownership upon the wife, the wife enjoys the rights of ownership, without their being conferred by express and additional terms, unless the circumstances or the context are sufficient to show that such absolute ownership is not intended. Where a Will gave certain property to the testator's wife and stated "as to whatever property there may remain after her death, my wife shall leave the said property to my two daughters."

The Privy Council held that,

"the Will created no trust in favour of the daughters for, to create a trust, the subject matter on which the trust is to operate must be certain to enable the Court to give it administration."

13. In RAGHUNATH PRASAD SINGH AND ANOTHER VS. DEPUTY COMMISSIONER, PARTABGARH AND OTHERS (AIR 1929 Privy Council 283), the facts were as follows:

One A died leaving a will bequeathing his property to P. The Will provided that after the death of A, his entire estate shall vest in P. It also further provided that P shall be "my heir and successor." "The said heir shall, after he has inherited me, be bound to abide by the following terms." Then subsequently the will further provided the conditions. In a suit subsequently by the heirs of A after the death of P it was contended that P took a life estate and not an absolute estate.

It was held by the Privy Council that,

"the words in the Will "that the estate shall vest in P" and that he shall be the testator's "heir and successor", were clear dispositive words creating an absolute estate of inheritance in P and the various clauses that followed the main provisions were to come into operation after P had so inherited; they must, therefore, be regarded as an attempt to impose repugnant conditions upon the estate so created and were, therefore, void."

14. In N. KASTURI VS. D. PONNAMMAL AND OTHERS (AIR 1961 SC 1302 = 1 961(3) SCR 955 = 1962(1) MLJ 174) it has been held as follows:

"The rule of construction of Wills that so far as is reasonably possible Courts should adopt that construction of the Will which would avoid intestacy cannot be treated as an absolute rule which should have overriding importance in construing a will. If two constructions are reasonably possible, and one of them avoids intestacy while the other involves intestacy, the Court would certainly be justified in preferring that construction which avoids intestacy. It may be permissible to invoke this rule even in cases where the words used are ambiguous and an attempt may be made to remove the ambiguity by adopting a construction which avoids intestacy.

Similarly in regard to one other rule that the construction which postpones the vesting of the estate after the death of the testator should be avoided, the position is exactly the same. It is obvious that a Court cannot embark on the task of construing a Will with a preconceived notion that intestacy must be avoided or vesting must not be postponed. The intention of the testator and the effect of the dispositions contained in the Will must be decided by construing the Will as a whole and giving the relevant clauses in the Will their plain grammatical meaning considered together. In construing a Will it is generally not profitable or useful to refer to the construction of other Wills because the construction of each Will must necessarily depend upon the terms used by the Will considered as a whole, and the result which follows on a fair and reasonable construction of the said

words must vary from Will to Will."

15. LAKSHMI AMMAL AND ANOTHER VS. ALLAUDDIN SAHIB (AIR 1962 Madras 247) is the decision relied on by Mr. Sampathkumar, learned Counsel for the respondents. That is a case where the testator gave the property to his wife absolutely. Interest of daughters was expressed in subsequent clauses. It was held that the wife took only a life estate and not an absolute estate. The testator in that case provided that after his lifetime his wife L should possess and enjoy the properties, which consisted of two items of land, with full powers of alienation, gift, sale and with absolute rights. The Will further provided that during the testator's life time his second daughter V should be got married. If she had got to be married after his lifetime, L should choose a bridegroom for her and get her married. The Will also contained a clause that after L's death, his daughter A should take the first item and V should take the second item with absolute rights.

It was held by a learned single Judge of this Court that,

"the testator was having in his mind the interest of his daughters as prominently as the interest of his wife, all three

of them being his heirs. The fact that the marriage of the second daughter was that to be performed was also in his mind. When the testator took care to indicate that the properties without any diminution even after his wife's lifetime should go to each of the daughters, it should be presumed that it was clearly in his mind that the wife's estate was only to be a limited estate or life estate and not an absolute estate."

16. This case instead of supporting the case of the respondents, supports the case of the appellants.

17. The next decision is CHINNAMMAL AND OTHERS VS. SRI KANNIKAPARAMESWARI DEITY (1964(1) MLJ 352). In that case, it has been held that,

"Section 97 of the Indian Succession Act lays down a general principle of interpretation of Wills which could equally be applied to a Will by a Hindu unless there was some clear indication of a contrary intention."

The principle is one which relates to the Law of Real Property in general.

18. In KAIVELIKKAL AMBUNHI VS. H. GANESH BHANDARY (1995(5) SCC 444) in paragraphs 3, 4, 5 and 6 the Supreme Court has held as follows:

"3. The rules of interpretation of the Will are different from the rules which govern the interpretation of other documents say, for example, a sale deed

or a gift deed or a mortgage deed or, for that matter, any other instrument by which interest in immovable property is created. While in these documents if there is any inconsistency between the earlier or the subsequent part of specific clauses inter se contained therein, the earlier part will prevail over the latter as against the rule of interpretation applicable to a Will under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of 'Will', the testator can always change his mind and create another interest in place of the bequest already made in the earlier part or on an earlier occasion. Undoubtedly, it is the last Will which prevails.

4. A Will may contain several clauses and the latter clause may be inconsistent with the earlier clause. In such a situation, the last intention of the testator is given effect to and it is on this basis that the latter clause is held to prevail over the earlier clause. This is regulated by the well known maxim "cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est" which means that if in a Will there are two inconsistent provisions, the latter shall prevail over the earlier. (See: HAMMOND, Re, HAMMOND VS. TREHARNE (1938(3) All.ER 308 = 54 TLR 903).

5. This principle is also contained in Section 88 of the Indian Succession Act, 1925 which, together with its illustrations, provides as under:

"The last of two inconsistent clauses prevails:- Where two clauses or gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.
Illustrations:

(i) The testator by the first clause of his Will leaves his estate of Ramnagar to 'A' and by the last clause to his Will leaves it to 'B' and not to 'A'. 'B' will have it.

(ii) If a man at the commencement of his Will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for

benefit of B, the latter disposition will prevail.

6. It may, however, be pointed out that this rule of interpretation can be invoked only if different clauses cannot be reconciled. (See: RAMESHWAR BAKHSH SINGH VS. BALRAJ KUAR (AIR 1935 Privy Council 187 = 1935 All. LJ 1133)."

19. In TAGORE VS. TAGORE (1874(1) IA 307 18 WR 359 (PC)) the devise was to A for life, remainder to his eldest son for life, then to the eldest son of the eldest son for life and so on. It was held that it could not be given effect in full, as the remaining provisions were unknown to Hindu Law and were bad. The life interest to A was upheld.

20. In G. NARAYANAN VS. R.N. RAJAGOPALAN (AIR 1987 Madras

75 = 100 LW 25) the testator bequeathed the property which was the subject matter of the dispute, in favour of his grandson, one G, the legatee and his heirs, to be enjoyed by them from generation to generation without any power of alienation with a direction that they should feed brahmins on a particular day. Two sons were born in 1945 and 1947. There was alienation and partition of suit properties in 1950. Sons of G filed a suit for declaration that their father G was entitled to a life estate and the various alienations would not hold good beyond the lifetime of G. It was held by the learned Judge that G, who was alive at the testator's death in 1928 was conferred only life estate, which was valid and the subsequent life estates in favour of his sons void. Creation of successive life interests is not permissible in law and therefore, the sons of G took the remainder absolutely free from the restrictions imposed on the nature of the estate. Having regard to the specific recitals contained in the Will under scrutiny before him the learned Judge held that these could not be successive life interests and what the remainder people took was an absolute estate.

21. In ADMINISTRATOR OF MADRAS VS. MONEY (15 Madras 448) a testator executed a Will bequeathing some properties to the legatees and added that the same shall be inherited by any child or children. It was held that this was in effect a gift to the legatees and their children as heirs. It was a bequest to a person with the addition of words which describe a class of persons but do not denote them as direct objects of a distinct and independent gift and by operation of the principle of Section 97 of the Indian succession Act, 1925 the legatee took the entire interest of the testator therein.

22. In AGNES HARRIET VS. MURRAY (AIR 1925 Oudh 24) and DADABHAI VS. COWASJI (AIR 1923 Bombay 177) it was held that a bequest to certain legatees and their children from generation to generation conferred absolute interest on the legatees.

23. The guide to interpret the Will is the will itself and the intentions of the testator/testatrix have to be gathered from the language of the will by construing the Will as a whole and giving the relevant clauses their plain grammatical meaning considered together. The language of one instrument does not afford much assistance in the construction of another. One must form an opinion about the construction of the Will apart from the decided cases and then to see whether those decisions require any modification of that opinion; not by considering how far the will in question resembles other Wills upon which decisions have been given. The rule of construction against avoidance of intestacy is not an absolute rule. The Court should not embark on the task of construing a will with a preconceived notion that intestacy must be avoided or vesting must not be postponed. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of any such rules depends upon the habits of thought and mode of expression prevalent among those to whose language they are applied. The principles laid down in the Indian Succession Act are all of them based on common sense, logic and a spirit of beneficient construction.

24. With the above principles in mind, on a proper reading of the Will in the present case there can be absolutely no doubt that the first

defendant took the properties absolutely after the lifetime of Adhilakshmi Ammal, wife of the testator. We should not forget that at the time the will was executed, he was a minor aged 16 years and unmarried and the testator died within two or three years thereafter. As rightly pointed out by the learned Counsel for the appellant, the intention of the testator was to protect Schedules 1 and 2 items and preserve them for the benefit of the then unmarried minor the present first defendant. In short, he was to be the ultimate beneficiary taking the properties absolutely. We have to give effect to the intention of the testator. The children of the first defendant are not denoted as direct objects of a distinct and independent gift in Ex.A-1. By virtue of Section 97 of the Indian Succession Act, the first defendant must be held entitled to the whole interest. The circumstances in the present case do not show that such absolute ownership was not intended. The embargo on alienation by the first defendant and his heirs in the later portion of the will is wholly void.

25. The interpretation given by the lower Appellate Court is clearly erroneous and cannot at all be sustained. When once the properties are taken absolutely by the first defendant under the terms of the Will, there is no question of there being any right in favour of the plaintiffs.
26. Consequently, the second appeal succeeds. The judgment and the decree of the lower Appellate Court are set aside and those of the trial Court restored. There will, however, be no order as to costs.

4-10-2002
Index: Yes
Internet: Yes

IGP

To

1. The First Additional District Judge,
Tirunelveli (with records).

2. The Principal Subordinate Judge,
Tirunelveli.

3. The Record Keeper,
V.R. Records,
High court,
Madras.